

Criminalisation of Bribery in Bhutan

Penal Code of Bhutan 2004 (Provided by the Anti-Corruption Commission Bhutan)

289. A defendant shall be guilty of the offence of bribery, if the defendant is a public official and accepts money, property, or other gratification for oneself or another person in exchange for doing an act or omitting to do an act that is related to the defendant's public duties.

290. A defendant shall be guilty of the offence of bribery, if the defendant offers money, property, or other gratification to a public official in exchange for the public official doing an act or omitting to do an act that is related to the public official's duties.

Anti-Corruption Act of Bhutan 2006 (Provided by the Anti-Corruption Commission Bhutan)

106. Any person who has committed an offence of corruption or who fails to comply with any provision of this Act or any other law shall be guilty of an offence.

138. In this Act unless the context otherwise requires:

(h) "Corruption" means:

- (i) Any person with a corrupt intention accepts or obtains or agrees to accept or attempts to obtain; gives or agrees to give or offers any gratification to any person or entity as an inducement or reward for doing or forbearing to do an act relating to the exercise or non-exercise of power in office or in the course of official duty, rendering the gratification an undue gratification. "Corrupt intention" includes any action motivated by or resulting inter alia in the following:
 - (1) Unethical and dishonest act;
 - (2) Abuse of authority;
 - (3) Use of position of trust for dishonest gain;
 - (4) Giving or enabling a person to receive preferential treatment; or

(5) Abuse and misuse of public resources.

- (ii) The commission or an attempt to commit, conniving in or acquiescing to commit, aiding or abetting to commit any act in the Schedule.

INTRODUCTION

Bhutan signed UNCAC in 2005 but has not yet ratified the Convention as of April 2010. It is not a member of the APG. Bhutan's legal system is based on British common law and Indian law. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

In Bhutan, active and passive domestic bribery is covered by two sets of overlapping legislative provisions. This creates some lack of clarity. The principal provisions are the offence of "corruption" under Sections 106 and 138(h) Anti-Corruption Act (ACA), according to the Bhutanese authorities. The second set of provisions is Sections 289 and 290 of the Penal Code, which contain general active and passive bribery offences. This report will focus on these two sets of general bribery offences. A third offence, bribery in tendering under Sections 109-111 ACA, does not directly deal with bribery of public officials, but will be referred to when interpreting the two general bribery offences.

International standards generally require coverage of three modes of committing active bribery, namely offering, giving, and promising an advantage. Section 138(h) ACA only covers a person who "gives or agrees to give or offers" a gratification; a promise to bribe is not mentioned. However, the definition of a gratification covers "offer, undertaking or promise" (Section 138(k)(5) ACA). Section 290 Penal Code is more limited as it expressly refers to only an offer to bribe. There is no case law to confirm whether the two offences cover the additional modes of active bribery. There is also no case law on bribes that are made but not received, or bribes that are rejected by an official.

As for passive domestic bribery, international standards generally demand coverage of solicitation or acceptance of a bribe. Section 138(h) ACA speaks of a person who "accepts, obtains, agrees to accept, attempts to obtain" a bribe. This likely covers both solicitation and acceptance. On the other hand, Section 289 Penal Code only covers acceptance of a bribe and may thus fall

short. An attempt to accept a bribe is a crime under the Penal Code, but it is unclear whether this would necessarily include all bribe solicitations.

It is not totally clear whether the general bribery offences adequately address bribes given, solicited, etc. through an intermediary. Sections 289 and 290 Penal Code and Section 138(h) ACA do not contain express language to this effect. Bhutan believes Section 138(h)(i) likely covers intermediaries since the provision includes gratifications given or offered “to any person or entity”, but no supporting case law was provided. The conclusion that intermediaries may not be covered is strengthened when one considers the bribery in tendering offence (Section 109 ACA) which expressly covers the giving of advantages “directly or indirectly”.

The treatment of bribes provided to a third party beneficiary (i.e. someone other than the official) is uneven. Section 289 Penal Code (passive domestic bribery) explicitly covers a public official who accepts a benefit “for oneself or another person”. Third party beneficiaries are thus clearly covered. Unfortunately, none of the other general bribery offences does so expressly. Case law is not available to clarify whether these offences implicitly cover third party beneficiaries.

The definition of a public official is also uneven. International standards broadly define “public official” to include legislative, administrative and judicial officials at all levels of government, as well as persons exercising a public function for a public authority, agency or enterprise, and persons providing a public service. Sections 289-290 Penal Code do not define a public official at all, thus raising questions over whether it meets the requirements of international standards. Section 138(t) ACA defines a “public servant”, but it is unclear whether this definition applies to the PC offences. By contrast, the offence in Section 138(h) ACA applies to bribery of “any person or entity”; the provision is not limited to public officials.

International standards also require broad coverage of the act or omission performed by an official in return for a bribe. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to that company.¹ In this regard, Sections 289-290 Penal Code covers acts or omissions that are “related to the public official’s duties”. Similarly, Section 138(h) ACA covers “exercise or non-exercise of power in office or in the course of official duty”. The language in these provisions should cover acts or omissions in relation to the performance of official duties. But it is

unclear whether it also covers any use of the public official's position or office, including acts or omissions outside the official's competence.

The nature of a bribe under the ACA is broad. Section 138(k) states that "gratification" means any "pecuniary or material benefit estimable generally in money". The term also includes non-pecuniary benefits such as protection from legal proceedings, exercise or refraining from exercising any rights or official duty etc. Furthermore, it is no defence that a gratification is customary in any profession, trade or vocation (Section 93 ACA). By contrast, Sections 289-290 Penal Code do not define the nature of a "gratification"; the breadth of these offences in this regard is therefore unclear. It is unclear whether Section 93 ACA (customary gratification is no defence) applies to the Penal Code bribery offences. The Bhutanese authorities could not indicate whether the definition of a bribe may be affected by factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best-qualified bidder. The Bhutanese authorities state that facilitation payments are prohibited by reason of Section 138 ACA.

Regarding the mental element, Section 138(h) ACA requires an offender (whether the briber or the official) to act with a "corrupt intention". This is defined as any action motivated by or resulting in an unethical and dishonest act; abuse of authority; use of position of trust for dishonest gain; preferential treatment; or abuse and misuse of public resources. This mental element of the offence is not found in relevant international standards and could thus restrict the applicability of the offence. By contrast, Sections 289-290 Penal Code do not contain such a limitation.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is unclear whether it is an offence in Bhutan to bribe officials of foreign governments or public international organisations in the conduct of international business. As mentioned above, Sections 289-290 Penal Code do not define a public official at all. Section 138(h) applies to bribery of "any person or entity"; the provision is not limited to public officials, domestic or foreign.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Bhutan has taken the commendable step of establishing the liability of legal persons for bribery. Liability for bribery under the ACA may be imposed against corporations, partnerships, organisations, enterprises, agencies, and other legal entities whether public or private. Liability can also be imposed against a legal person's successor, representative or agent (Section 138(p) ACA). The Penal Code is narrower. Only corporations and business

associations may be held liable (Section 508 Penal Code). However, members of the board of directors and “high managerial agents” may be prosecuted along with the legal person.

While its coverage of legal persons is broad, the ACA is unclear on when liability would be imposed against the legal person. The Act does not specify any rules for attributing the acts of a natural person to a legal person. The Penal Code is much clearer in this respect. Section 508(c) states that a company is liable only for crimes committed by the Board of Directors or a high managerial agent acting on behalf of the corporation and within the scope of their office or employment. Accordingly, a company cannot be liable for the acts of outside agents, contractors, or mid- and low-level employees.

The restriction of corporate liability to only crimes committed by the most senior officers of the company is problematic for at least three reasons. First, liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, it is unclear whether the requisite criminal intent for the crime must be found in a single person, and that aggregating the states of mind of several persons in the company will not suffice. If so, this ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.²

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.³ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer,

promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

There are two additional issues concerning liability of legal persons. First, the legislation does not clarify whether corporate liability depends on the conviction of the natural person who committed bribery. Second, it is also unclear whether corporate compliance programmes affect liability, since courts have yet to grapple with this issue.

JURISDICTION TO PROSECUTE BRIBERY

Bhutan has jurisdiction over bribery committed in its territory. The Penal Code and the ACA apply to the whole of the Bhutan (Section 1(c) Penal Code and Section 1(c) ACA). However, these two statutes do not specifically address acts committed only partly in Bhutan, *e.g.* when some elements of a bribery offence are committed outside Bhutan.

As for extraterritorial jurisdiction to prosecute bribery, the bribery offence in Section 130(h) ACA applies extraterritorially to all public servants (Section 119 ACA). There is no such corresponding provision for bribers under the ACA, or for offenders under the Penal Code.

Concerning nationality jurisdiction, Section 20 of the Civil and Criminal Procedure Code states that the Supreme and High Courts may exercise jurisdiction on the basis of nationality. This presumably allows the Courts to try Bhutanese nationals for bribery committed outside of Bhutan. The provision also recognises “passive personality” jurisdiction, thus giving courts jurisdiction to try crimes committed against Bhutanese nationals. Whether these principles apply to legal persons is unclear. Bhutan states that it has nationality jurisdiction to prosecute legal persons but did not provide case law in support of its position.

SANCTIONS FOR BRIBERY

The bribery offences in Section 289-290 Penal Code are subject to “value-based sentencing”. Depending on the “amounts involved in the crime”, four ranges of sentences are available.

Amount involved in the crime	Classification of offence	Sentence available
Less than the sum of the daily national minimum wage for a period of <u>7 years</u>	Petty misdemeanour	Imprisonment of 1 month to less than 1 year or a fine in lieu of imprisonment
Between the sum of the daily national minimum wage for a period of <u>7 years</u> and <u>15 years</u>	Misdemeanour	Imprisonment of 1 to less than 3 years or a fine in lieu of imprisonment
Between the sum of the daily national minimum wage for a period of <u>15 years</u> and <u>30 years</u>	Fourth degree felony	Imprisonment of 3 to less than 5 years
Greater than the sum of the daily national minimum wage for a period of <u>30 years</u>	Third degree felony	Imprisonment of 5 to less than 9 years

However, it is not entirely clear what “amounts involved” in a bribery offence refers to, *e.g.* the amount of a bribe, or the value of a contract obtained through bribery. It is also unclear how an offence would be classified when a monetary value cannot be assigned to a bribe. Bhutan intends to amend the ACA to abolish this system of “value-based” sentencing. However, the ACA Bill 2010 if passed would retain value-based sentencing for bribery of foreign public servants. The maximum penalty for this offence in the Bill is “imprisonment for a term equivalent to a third degree felony or value based sentence, whichever is higher”.

In addition, Section 47 Penal Code requires a court to confiscate the proceeds, instrumentalities, and benefits of an offence upon conviction. This should allow confiscation of the bribe and the proceeds of bribery. In the absence of a conviction, a separate provision (Section 48) allows a Court to confiscate any property or assets acquired by the commission of a crime such as corruption. Confiscation under this provision is discretionary, unlike post-conviction confiscation under Section 47. It is not entirely clear whether Sections 47 and 48 allow confiscation of property obtained indirectly from bribery.

The bribery offence under Section 138(h) ACA is punishable by a fine, imprisonment, or both (section 122 ACA). The maximum punishment available is not apparent in the statute. Upon conviction, a Court may order confiscation of the proceeds, articles used in the offence (which presumably covers a bribe), and any benefit derived from the offence. Unlike the Penal Code, the ACA allows for the blacklisting or debarment any national or foreign firm from

participating in government tender. A contract or license may also be revoked (Sections 45(i) and (j) ACA).

Neither the ACA nor the Penal Code specifically allows a Court to impose a fine equivalent in value to property that is subject to confiscation. It is thus unclear whether any additional sanctions are available when confiscation is not possible, *e.g.* when the property that is subject to confiscation has been spent or converted.

TOOLS FOR INVESTIGATING BRIBERY

Bhutan has a range of tools for investigating bribery. The Anti-Corruption Commission may issue a summons to obtain information and records, including from banks and other financial institutions. Bank secrecy laws do not apply (Section 70(b) ACA). It takes on average three days to obtain records and information from financial institutions, according to Bhutanese authorities. In addition, investigators can apply to a Court for a warrant to search and seize documents if necessary (Section 168 Civil and Criminal Procedure Code). Bank accounts may also be frozen during an investigation (section 49 ACA).

Bhutan does not have specific provisions for seeking tax records in bribery investigations. The Anti-Corruption Commission may invoke all investigative powers under the Civil and Criminal Procedure Code. In addition, the ACA authorises the Commission to demand the production of information and documents. However, whether tax secrecy rules impede these powers is unclear, though Bhutanese authorities state that access to information is unimpeded upon the production of a court order. The Commission can also access asset declarations of public officials. The ACA Bill 2010, if passed, would expressly provide for the co-operation between the Anti-Corruption Commission and various government agencies including the Royal Monetary Authority and the Department of Revenue and Customs.

The Bhutanese authorities state that interception of communications is available in bribery investigations. The Civil and Criminal Procedure Code contemplates wiretapping only in investigations of a “heinous crime”, a term that is undefined. Courts have interpreted this provision to allow the Anti-Corruption Commission to conduct wiretaps in bribery cases. The opening of mail is only available if there are reasonable grounds to believe narcotics or contraband will be found, which is unlikely to arise in bribery cases.

Some covert investigative techniques are also available in bribery cases. The ACA allows the Anti-Corruption Commission to authorise a person to give or receive bribes during an investigation. Secret surveillance, video recording,

listening and bugging devices, and controlled deliveries are not described in the ACA or CCPC. The Bhutanese authorities state that the Anti-Corruption Commission has used covert investigative techniques – except for controlled deliveries – in practice. Listening and bugging devices are legally available but not used in practice because of the lack of technology.

There is limited international assistance in bribery cases. Bhutan may seek extradition from a foreign country only if there is an applicable treaty, convention or agreement (Section 164.6 CCPC). However, it may extradite a person to a state with which it has no treaty relations (Extradition Act, Section 1). As for mutual legal assistance (MLA), Section 55 ACA authorises the Anti-Corruption Commission to collaborate with other countries, and international and regional organisations, including in investigations, asset recovery and information sharing. On its face, this should allow the Commission to seek MLA, though the Bhutanese authorities would prefer more elaborate legislative provisions. They hope that the ACA Bill 2010, if passed, would rectify this situation.

The ACA and CCPC set out a procedure for plea bargaining. With the prosecution's consent, an accused may plead guilty to a lesser offence. The prosecution has sole discretion in accepting a plea bargain, having regard to the nature and circumstances of the offence and the accused's criminal record. The plea bargain may also involve the exchange of evidence deemed critical for the prosecution of other individuals. The legislation does not require a Court to approve a plea bargain, though a Court has a residual discretion to order an accused to make restitution or pay compensation. There are also no provisions dealing with immunity from prosecution for persons who co-operate in corruption investigations or prosecutions.

ENFORCEMENT OF BRIBERY OFFENCES

The Anti-Corruption Commission of Bhutan (ACC) conducts criminal investigations in corruption cases, though its constituting statute does not vest it with exclusive jurisdiction over such cases. The Attorney General and other prosecuting agencies generally prosecute cases. However, the Commission, "when it deems necessary and expedient, may prosecute a person charged with corruption or take over a prosecution process from the prosecuting agency or police when the case is delayed without a valid reason, manipulated or hampered by interference" (Anti-Corruption Act Sections 45-46 and 89-93).

The Commission's website contains fairly extensive information and statistics on criminal corruption cases. From 2006 to September 2008, the ACC received 1 576 corruption complaints and opened 33 investigations involving

196 persons. However, bribery offences were involved in only a small fraction of these cases (57 complaints and 3 investigations).⁴

Only one bribery case reached the courts during this period, however. An official who received a BTN 65 000 (approximately EUR 1 100 or USD 1 500) bribe for tampering with procurement-related documents was given a BTN 3 000 (approximately EUR 50 or USD 70) fine plus a fine of BTN 36 000 (approximately EUR 600 or USD 800) in lieu of imprisonment for one year. On appeal, the sentence was eliminated on grounds that the administrative sanctions imposed on the official (reprimand and transfer) were adequate.⁵ The briber was not prosecuted.

Data on other cases not involving bribery suggest that Bhutanese courts might impose fairly significant sanctions for corruption. In a series of cases involving illegal misappropriation or transfer of land, corrupt officials received significant jail sentences of up to almost ten years. For offences involving property of lower value, courts impose fines in lieu of imprisonment fairly frequently. Administrative sanctions (*e.g.* license suspension) were also imposed in some cases.⁶

RECOMMENDATIONS FOR A WAY FORWARD

Bhutan's scheme for criminalising bribery meets many aspects of international standards on the criminalisation of bribery. To strengthen this scheme, Bhutan could consider addressing the following issues. At the time of this report, Bhutan was in the process of amending its Anti-Corruption Act. The Bhutanese authorities expected the amended Act to address many of these issues.

Elements of the Active and Passive Bribery Offences

Bhutan's bribery offences in the ACA and the Penal Code already meet many requirements found in international standards, *e.g.* coverage of pecuniary and non-pecuniary bribes, and several modes of active and passive bribery. To improve the bribery offences, Bhutan could consider addressing the following areas:

- (a) The overlap between the bribery offences in the Penal Code and the Anti-Corruption Act, and the application of the inconsistent features in those provisions;

- (b) Express inclusion of additional modes of committing bribery in the Penal Code, such as promising a bribe, giving a bribe (for Section 290 Penal Code) and soliciting a bribe;
- (c) Incomplete offences, such as when a bribe is offered but not received by an official, or when an official rejects a bribe;
- (d) Express coverage of bribery through intermediaries and bribes paid to third party beneficiaries;
- (e) Express definition of a public official that covers legislative, administrative and judicial officials at all levels of government, as well as persons exercising a public function for a public authority, agency or enterprise;
- (f) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (g) Definition of a “gratification” in the Penal Code;
- (h) Whether the definition of a bribe may be affected by factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best-qualified bidder; and
- (i) The definition of “corrupt intention” in the ACA.

Bribery of Foreign Public Officials

To bring its bribery legislation in line with international standards, Bhutan should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Bhutan may hold corporations criminally liable for bribery. This is commendable and responds to requirements under international standards. To improve the effectiveness of this regime, Bhutan could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Bhutan could also consider addressing the following issues:

- (a) Expanding the types of legal persons that could be held liable for bribery under the Penal Code; and
- (b) Whether corporate liability depends on the conviction of a natural person for the crime.

Jurisdiction for Prosecuting Bribery

The ACA, Penal Code, and the Civil and Criminal Procedure Code provide a wide jurisdictional base for prosecuting bribery. To enhance this scheme, Bhutan could consider addressing or clarifying:

- (a) Jurisdiction to prosecute bribery that is committed partly in Bhutan; and
- (b) Nationality jurisdiction to prosecute legal persons for bribery.

Sanctions for Bribery

Bribery offences under the Penal Code are punishable by imprisonment of one month to nine years, depending on the “amount involved in the crime”. A fine may be imposed in lieu of imprisonment in less serious cases. The maximum punishment for bribery under the Penal Code appears in line with international standards. Although the number of bribery cases may be too few for drawing definitive conclusions, judicial decisions in other cases show that serious corruption offences can attract custodial sentences.

To further ensure that sanctions for bribery are effective, proportionate and dissuasive, Bhutan could clarify the following issues:

- (a) Whether the “amount involved in the crime” relates to the value of a bribe or the value of fruits of bribery (*e.g.* contract awarded);
- (b) The availability of blacklisting and debarment from public procurement as sanctions for bribery under the Penal Code;
- (c) The maximum punishment available for the general bribery offence in the ACA;
- (d) Confiscation of property obtained indirectly from a bribery offence; and
- (e) The availability of fines equivalent in value to property that is subject to confiscation.

Tools for Investigating Bribery

The basic tools for investigating bribery are available in Bhutan. This includes a summons procedure for obtaining documents from financial institutions that is fairly efficient in practice. The express legislative provision overriding bank secrecy is commendable. To enhance the ability of law enforcement to investigate bribery, Bhutan could address the following matters in the context of bribery investigations:

- (a) Codifying the use of covert investigative techniques such as surveillance, video recording, listening and bugging devices, and controlled deliveries;
- (b) Granting immunity from prosecution to a person who co-operates in a corruption investigation or prosecution;
- (c) Enacting more detailed legislative provisions on mutual legal assistance; and
- (d) Allowing extradition from countries to Bhutan in the absence of a treaty, in the same manner as Article 1D of the Extradition Act, which currently allows extradition from Bhutan to a foreign country without a treaty.

Enforcement of Bribery Offences

Bhutan could consider the reasons for its relatively low rate of prosecutions and conviction for bribery.

RELEVANT LAWS AND DOCUMENTATION

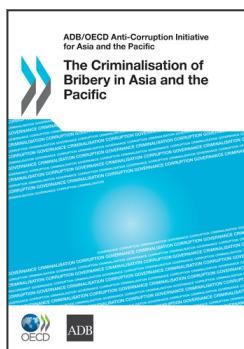
Anti-Corruption Act of Bhutan 2006: www.anti-corruption.org.bt/pdf/accacte.pdf

Penal Code, and Criminal and Civil Procedure Code: www.judiciary.gov.bt/html/act/act.php

Anti-Corruption Commission of Bhutan: www.anti-corruption.org.bt

NOTES

- ¹ See OECD Convention, Commentary 19.
- ² See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ³ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁴ Data taken from Anti-Corruption Commission Annual Report 2008 and the Compilation of Cases Investigated by Anti-Corruption Commission. See also the ACC's Annual Report 2007. All documents are available on the ACC's website (www.anti-corruption.org.bt).
- ⁵ Information taken from the Compilation of Cases Investigated by Anti-Corruption Commission (www.anti-corruption.org.bt).
- ⁶ *Ibid.*



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